IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1950. No. 427.

ELIZABETH HEALY, Administratrix of the Estate of JOHN E. HEALY, Deceased,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR RE-HEARING OF ORIGINAL PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Elizabeth Healy, Administratrix of the Estate of John E. Healy, deceased, and the above named petitioner, and respectfully petitions this Honorable Court to grant

this petition for a re-hearing of the original petition for certiorari, which was denied by this Court on February 26, 1951.

DECISION AND JUDGMENT OF THE COURT BELOW.

The opinion of the Court below, as amended on October 10, 1950, is reported in 184 F. 2d 209 (C. A. 3, 1950). The opinion appears on page 181 of the Record filed with the original petition for certiorari.

NATURE OF THE CASE AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

The nature of the case and a summary statement of the matter involved is found in petitioner's original petition for certiorari and is therefore not repeated here.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered September 11, 1950. The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., §56) and the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., §1254).

QUESTIONS PRESENTED.

1. Did not the Court of Appeals (Third Circuit) err in reversing judgment, entered on a verdict for the plaintiff, on the sole ground that no causal connection had been "demonstrated" between what the Court conceded to be the "negligence" of defendant's engineer in failing to sound a warning whistle, and the death of plaintiff's decedent, where the Court overlooked, failed to consider, or even to mention a number of other glaring items of substantial negligence as to which there could be no question of causation, and instead treated the defendant's failure to sound the whistle as "the only conceivable negligence"?

2. Even if failure to sound the whistle was the only negligence of the defendant's employees, as suggested by the Court of Appeals, did not the Court err in holding as a matter of law that such negligence was not a cause in whole or in part of the death, despite the jury's verdict to the contrary after the charge by the Trial Court had left the question of causation to the jury?

3. Does not the decision of the Court of Appeals deny to the plaintiff a right to a jury trial on the questions of negligence and causation as guaranteed by the Federal Employers' Liability Act, the Constitution of the United States, and repeated decisions of this Court?

REASONS RELIED UPON FOR ALLOWANCE OF PETITION.

1. The decision of the Court below, establishing a new standard of negligence in Federal Employers' Liability Act cases, contrary to the letter and spirit of *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949), and emasculating the 1939 amendments to the Act, will, if permitted to stand, encourage the re-litigation of cases under the F. E. L. A. and invite a flood of appeals. Therefore, under Rule 38, a writ of certiorari should be granted to clarify the law and avoid conflict among the Circuits.

2. The opinion of the Court of Appeals is obviously in conflict with decisions of this Court, with respect to plaintiff's right to a jury determination of issues of causation, and clearly warrants granting of the Petition for Re-Hearing on Writ of Certiorari and reversal of the judgment of the Court of Appeals. See, e. g.,

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944);

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946);

Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949);

Penn v. Chi. and N. W. Ry. Co., 335 U. S. 849, 69 S. Ct. 79 (1948).

3. Even assuming that the only negligence on the part of the defendant was the failure to sound the whistle, the Court of Appeals was guilty of patent error of law (1) in

holding that no causal connection had been made out merely because causal connection had not been "demonstrated" with physical absoluteness, (2) in rejecting the implicit finding of the jury on the issue of causation by treating the issue of causation as one of law rather than fact.

4. The opinion of the Court of Appeals is clearly in conflict with decisions in other Circuits with respect to the plaintiff's right to a jury determination of the issue of causation. See, e. g.,

Casey v. American Export Lines, 173 F. 2d 324 (C. A. 2, 1949);
Eglsaer v. Scandrett, 151 F. 2d 562 (C. A. 7, 1945);
Kurimsky, Admx. v. Unity Rys. Co., 357 Pa. 521, 55 A. 2d 378 (1949).

5. The opinion of the Court of Appeals is clearly in conflict with its own decision with respect to the plaintiff's right to a jury determination on the issue of causation. See *Eiseman v. Pennsylvania R. Co.*, 151 F. 2d 222 (C. A. 3, 1945), presenting virtually the identical facts.

6. Assuming that certiorari should not be granted where, if there be error in the opinion of the Court below, it was predicated upon an erroneous evaluation of the facts, the decision in this case is clearly predicated upon an erroneous statement of the principles of law that control. It is true that this Court has considered these questions and has refused certiorari, two justices dissenting on the refusal. However, where it has been demonstrated that crucial legal questions are involved, this Court has granted certiorari although previously denied. See *Hickman v. Taylor*, 153 F. 2d 212 (C. A. 3, 1945), cert. den. 327 U. S. 808, 66 S. Ct. 961 (1946), vacated 328 U. S. 816, 66 S. Ct. 1337 (1946).

PRAYER.

Petitioner prays that a Writ of Certiorari be granted by this Honorable Court directed to the Court of Appeals for the Third Circuit to the end that the record in this case be reviewed by this Court, and that upon such review the judgment of the Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING OF ORIGINAL PETITION FOR CERTIORARI.

I. The decision of the Court below is in conflict with the settled interpretation of the Act and, if allowed to stand, will provoke excessive litigation.

The Federal Employers' Liability Act represents the legislative answer to the great social need for protecting railroad employees from the hazards of their occupation. The purpose of the Act was to provide a means within the framework of the jury system for equalizing the burdens of proof and responsibility between the employer and the employee. The 1908 Act abolished the fellow-servant rule. Subsequently the Act was emasculated by the courts *Chesapeake & O. R. Co. v. Nixon*, 271 U. S. 218, 46 S. Ct. 495 (1926); *Atlantic Coast Line R. Co. v. Driggers*, 279 U. S. 787, 49 S. Ct. 490 (1929). Congress, in 1939, amended

the Act specifically to bar the defenses of the fellow-servant rule and assumption of risk. The Court has repeatedly given effect to that legislative intent. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943); *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949). Moreover, other correlative legislation has imposed strict duties of care upon the employer. Boiler Inspection Act and Safety Appliance Acts, 45 U. S. A. §§1-23. The violation of any of these statutory safety requirements imposes absolute liability, irrespective of negligence. *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949). Such legislation is but a part of the trend, in tort law, to require legal responsibility without proof of moral culpability. Mr. Justice Holmes observed that

> "* * * while the terminology of morals [in tort law] is still retained, and while the law does still and always does, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmitting those moral standards into external and objective ones, from which the actual guilt of the party concerned is wholly eliminated."[1]

The purposes of the safety legislation and of the 1939 Amendments to the Act have been effectuated by the many rulings of this Court which have specifically confided to the jury the difficult problem of causal relationship between negligence or violation of a safety law or rule and the injury for which recovery is sought under the Act. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, 338

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[1] Holmes, The Common Law 38 (31st printing, 1938).

U. S. 384, 70 S. Ct. 200 (1949); *Carter v. Atlanta & St. A. B. Ry. Co.*, 338 U. S. 430, 70 S. Ct. 226 (1949).

When the 1939 amendments to the F. E. L. A. were passed, it was thought that the whalebone corset restraints of the statute had been discarded. In its stead, the railroad workers were given a "two-way stretch." This Court had held that under the F. E. L. A., a statute based on negligence, the approach would be as broad as the common sense of the communities which furnished the juries to hear these cases. This Court, generations ago, had said that it should be so. See *Jones v. East Tenn. R. R.*, 128 U. S. 443, 445 (1888):

> "We see no reason, so long as the jury system is the law of the land, and the juries made the tribunal to decide disputed questions of fact, why it should not decide such questions as these (negligence and contributory negligence) as well."

Had not Mr. Justice Butler, for this Court, in *Jamison v. Encarnacion*, 218 U. S. 635, 50 S. Ct. 440 (1929), said:

> "The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purpose for which enacted * * *"?

Although the Court in that case was considering the Jones Act, 46 U. S. C. A. §688, its holding and language are equally applicable to the F. E. L. A. They are parallel statutes, serving two broad and similar groups of employees.

Discussion of a compensation act for railroad employees is wholly irrelevant. But the possibility of such an alternative remedy has been suggested many times. Chief Justice Taft in 1929 advocated a compensation law for railroad

employees.[2] It is frequently alluded to in F. E. L. A. cases.[3] Since Congress has not seen fit to pass such a law, an imaginary compensation act for railroad employees does not solve the problem of the plaintiff in the case at bar. Nor would it be likely to improve the lot of other railroad employees.[4] Indeed, the railroad employees have expressed satisfaction with the type of remedy provided by the Act.[5] England recognized the shortcomings of a compensation law ten years ago and repealed the British act. Nevertheless, counsel in arguing for an outmoded and restrictive interpretation of the F. E. L. A. frequently invoke the non-existent compensation act for railroad workers to indicate a humane concern for the plight of the injured, maimed and fatally injured employee and his family. It is ritual without significance.

Congress has refrained, since the passage of the first

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[2] Richter and Forer, **Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers**, 36 Cornell L. Q. 203 (1951).

[3] See the remarks of Mr. Justice Frankfurter in **Tiller v. Atlantic Coast Line R. R.**, 318 U. S. 54, 63 S. Ct. 444 (1943):

> "But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence."

See his expression of similar views in the dissenting opinion in **Wilkerson v. McCarthy**, 336 U. S. 53, 65, 69 S. Ct. 413, 419 (1949). See also **Eckenrode v. Pennsylvania R. Co.**, 335 U. S. 329, 69 S. Ct. 91 (1948); **Raudenbush v. Baltimore & O. R. Co.**, 160 F. 2d 363 (C. A. 3, 1947); and dissenting opinion in **Carter v. Atlanta & St. A. B. Ry. Co.**, 338 U. S. 430, 70 S. Ct. 226 (1949).

[4] Richter and Forer, **Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers**, 36 Cornell L. Q. 203 (1951).

[5] 84 Cong. Rec. 9407 (1939). Senator Burke, in explaining the provisions of the 1939 Amendment, stated:

> "The representatives of the railroad brotherhoods appeared and presented a very full and clear justification for the measure. The Federal Employees Compensation Board approves the changes."

See also Sen. Rep. No. 243, 76th Cong., 1st Sess. (1939).

Federal Employers' Liability Act in 1906, and with full knowledge of these cases, from putting railroad workers under a compensation law. It has instead chosen to preserve to railroad employees their Anglo-American heritage of the right of trial by jury, while enlarging the protection granted under the Federal Employers' Liability Act.

The case at bar arose under the Federal Employers' Liability Act. The jury determined that the death was caused by the negligence of the engineer in failing to sound his whistle. The Court of Appeals, in reviewing this issue, has usurped the fact-finding function of the jury. It has departed radically from the well-established and wise interpretation of the law as laid down by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943) and in *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946).

It is absolutely impossible to distinguish the instant case from the case of *Eiseman v. Pennsylvania R. Co.*, 151 F. 2d 222 (C. A. 3, 1945). There, too, the case went to the jury solely on the question of whether a whistle had been blown or a bell rung. In that case, too, the employee was killed when run down by a train. There was absolutely no evidence to "demonstrate a causal connection between the failure of the engineer to sound the whistle and the happening of the accident, or that that failure contributed 'in whole or in part' " to the employee's death, as required by the Court of Appeals in this case; yet, nonetheless, the Third Circuit reversed a judgment n. o. v. entered by the Court below for the very reason that it now here ascribes in setting aside a verdict for the plaintiff, which has been passed upon not only by the jury, but by the trial judge in permitting the verdict to stand. In the *Eiseman* case, the Court said, at 224:

> "* * * if a witness was in a position where 'in all probability' he would have heard a bell signal if one had

been given, the issue of the giving of the signal is treated as one for the jury. See the clear and emphatic ruling of Judge Phillips in Union Pac. R. Co. v. Burnham, 10 Cir., 124 F. 2d 500, 502, and the authorities cited in the note to that opinion."

Re-hearing is prayed for because this is not merely a single piece of litigation. The decision in the case at bar, if not reversed, will not stand as a sport in the law. Rather, it will mark the beginning of the erosion of the rights of employees established by Congress under the F. E. L. A.

Following all legislation with high social purpose, the first attack is on its constitutionality. Having passed that hurdle, the opinion of the Court grants wide coverage. *Tiller v. Atlantic Coast Line R. Co.*, supra. The attack then shifts. The burrowing from within and below begins. Serious import is given to arguments which would originally have been considered sheer effrontery.

Legislation once passed and sustained is, in the public mind, a problem solved. A decision that seems but an innocuous distinction for just that *one* case can lead to the complete emasculation of a statute. Though the benefits of the law have been erased, the empty words remain on the statute books presenting a false and cruel deception to litigants and to the public. Such a result is more valuable to those who opposed the legislation in the first place than having no legislation at all. The statute is now harmless. It quiets the do-gooders.[6]

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[6] A new political party having for the first time in fifty years in Pennsylvania assumed charge of the state administration in 1935, the legislature, in fulfillment of its promise of social improvement, passed the Survival of Action statute in 1937, P. L. 2755 (Pa.). It provided for the same measure of damages in death actions as though the suit had been instituted during the lifetime of the deceased. Its first interpretation, in **Pezzulli, Admr. v. D'Ambrosia**, 344 Pa. 643, 26 A. 2d 659 (1941) established total and complete recovery for losses sustained. By 1949, **Murray v. Philadelphia Transportation Co.**, 359 Pa. 69, 58 A. 2d 323 (1948) had virtually disembowelled the Act.

Following the decision in the case at bar, the courts will be inundated by a flood of litigation to re-define and whittle away the rights granted under the F. E. L. A. and to re-define the Act and the functions of judge and jury. Every effort will be made to reinstate the narrow, legalistic approach to the law embodied in *Chamberlain v. Pennsylvania R. Co.*, 288 U. S. 333, 53 S. Ct. 391 (1933). That case has been implicitly overruled in *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), and *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944). Mr. Justice Rutledge vigorously opposed any such suggested return to such a position in many cases. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232 (1943). The reference to *Galloway v. U. S.*, 319 U. S. 372, 63 S. Ct. 1077 (1943) in the recent opinion in *Moore v. Chesapeake & O. R. Co.*, 71 S. Ct. 428 (1951), would perhaps cause reactions more severe than those recently ascribed to Bentham.

The dangers of permitting deviation from the broad, basic principles are evidenced in the history of litigation subsequent to *Kilpatrick v. Texas & P. Ry. Co.*, 337 U. S. 75, 69 S. Ct. 953 (1949). Following that case, in which the venue clause of the Act was interpreted to narrow the selection of a forum, the usual excesses in litigation occurred.[7]

Nineteen years ago, it was pointed out that the Supreme Court worked in a sterile field, re-litigating factual minutiae of cases arising under a single statute, namely, the Federal

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[7] See **DeVane v. U. S. Court of Appeals for the Fifth Circuit**, cert. den. Mar. 5, 1951, No. 302, Misc. Dkt., U. S. Supreme Court. Cf. **Ford Motor Co., et al. v. Ryan**, 182 F. 2d 329 (1950) and **Headrick v. Atchison, T. & S. F. Ry. Co.**, 182 F. 2d 305 (1950). This Honorable Court has, of its own motion, re-opened cases in which there was a conflict in the Circuits and the manifest possibility of future injustice, and granted certiorari. See **Lustig v. United States**, 338 U. S. 74, 69 S. Ct. 1372 (1949); **United States v. Shaughnessy**, 338 U. S. 521, 70 S. Ct. 329 (1950).

Employers' Liability Act.[8] Since that time, the interpretation of the law has been so thoroughly established[9] and so completely accepted by counsel and litigants all over the country that at this term of court only five petitions for certiorari in cases arising under the F. E. L. A. were sought. This is to be contrasted with the staggering amount of litigation under the various compensation acts.[10]

Limitation of certiorari can embrew more litigation than it stifles. Therefore, it is respectfully urged that this petition for re-hearing presents an appropriate case for the consideration of your Honorable Court within the letter and spirit of Supreme Court Rule 38.

II. Certiorari should be granted where error is not in possible misevaluation of the facts, but rather in the legal principles relied upon.

It has been suggested that certiorari should not be granted even where it may well be that the facts have been improperly evaluated by the Court of Appeals, so long as the basic legal principles have been recognized, understood and applied. See opinion of Mr. Justice Frankfurter in *Carter v. Atlanta & St. A. B. Ry. Co.*, 338 U. S. 430, 70 S. Ct.

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[8] Frankfurter and Landis, **The Supreme Court at October Term**, 1931, 46 Harv. L. Rev. 226, 244 (1932).

[9] **Wilkerson v. McCarthy**, 336 U. S. 53, 69 S. Ct. 413 (1949).

[10] Multitudinous questions of whether an injury "arises out of the employment" are certainly arid legal waste. Mr. Justice Murphy, in dealing with such a problem (which rarely gets into the federal courts), characterized the workmen's compensation acts as "deceptively simple and litigiously prolific." **Cardillo v. Liberty Mutual Insurance Co.**, 330 U. S. 469, 479, 67 S. Ct. 801, 807 (1947). The obstacles to recovery and the legalistic defenses deplored by courts and counsel considering the F. E. L. A., are not eliminated under a compensation act. See **O'Leary v. Brown-Pacific-Maxon, Inc.**, 71 S. Ct. 470 (1951); Richter, and Forer, **Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers**, 36 Cornell L. Q. 203 (1951).

226, 231 (1949). Although this rule may work hardship in certain instances, this is not the problem in the case at bar. In this case, the Court below has laid down a principle of law on causation that flagrantly and diametrically opposes all that this Court has repeatedly stated to be the law in *Tennant v. Peoria & P. U. Ry. Co.*, supra, *Lavender v. Kurn*, supra, *Coray v. So. Pac. Ry.*, supra, *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, and *Carter v. Atlanta & St. A. B. Ry. Co.*, supra. Indeed, the Court of Appeals, in suggesting a "but for" doctrine of causation, has created and imposed a new burden of proof upon the employee which is nowhere to be found in the statute or in the interpretation thereof as rendered by this Court during the entire 43 years of this statute's existence. It is violative of the spirit of the statute itself and of everything this Court has ever said upon that subject.

Old thoughts and approaches die slowly. It is uncomfortable for judges up and down the line to give up their hornbook routine and thinking, particularly in cases dealing with master-and-servant relationships in all its forms. Encrusted with die-hard ideas of defenses conceived in the days of laissez-faire economics that had studded the surface of the F. E. L. A. like the warts on a cucumber, the impact and the scope of the decision in the *Tiller* case, with all its implications, was mighty indeed. Naturally they yielded reluctantly to the intended elasticity of the remodeled statute from which the defense of assumption of risk had been deleted in all its guises. The phrase "in whole or in part" had received the broad extended coverage indicated in such cases as *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. A. 7, 1945), *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. A. 7, 1946) and *Coray v. So. Pac. Ry.*, 335 U. S. 520, 69 S. Ct. 275 (1949).

The narrow view on causation suggested by the Court of

Appeals in this case may be likened to the view of the Court of Appeals in *Penn v. Chi. & N. W. Ry. Co.*, 163 F. 2d 995 (C. A. 7, 1947), 335 U. S. 849, 69 S. Ct. 79 (1948), in which this Court granted certiorari and reversed at one and the same time, in two lines. The decision of the Court below on proximate cause is absolutely inconsistent with the decision in *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. 2d 949, 952 (C. A. 8, 1950), where this Court said, as to causal relationship:

> "The Court in such a case has equally no right to direct a verdict on legalistic refinements between remote and immediate causation. * * * The choice between conflicting theories of causation, each of which is a rational possibility on some probative fact or facts, is one which the jury alone is entitled to make."

In the *Penn* case, this Court granted certiorari, reversed and cited the controlling case, all at one and the same time. This expeditious and unequivocal way of reversing and reestablishing the appropriate legal doctrine would, we respectfully suggest, be highly appropriate in the case at bar. In that manner, the knife that repeatedly seeks to carve out of this statute new exceptions whereby protection of railroad employees is effectually destroyed, will be dulled.

Since the decision of the Court below was based solely upon an *error of law*, this is an appropriate case for certiorari, even within the restricted view of *Carter v. Atlanta & St. A. B. Ry. Co.*, supra.

III. The question of causal relation between the negligence and the fatal injury was one of fact exclusively for the jury.

In the case at bar, the jury found a verdict for the plaintiff, based upon negligence. The Court of Appeals conceded that the jury had found that the engineer did not sound his whistle as he reached the station, in violation of rule 14 (p). The Court, returning to the outmoded concepts of the *Chamberlain* case, declared that plaintiff must prove that but for this admitted negligence, Healy would not have been run down. The Court stated:

> "There is nothing to *demonstrate* a causal connection between the failure of the engineer to sound the whistle and the happening of the accident, or that that failure contributed 'in whole or in part' to Healy's death." (Emphasis ours.)

The Court cites, in support of this extraordinary position, its own opinion in *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327 (C. A. 3, 1942), as well as *Tiller v. Atlantic Coast Line, R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943), 323 U. S. 574, 65 S. Ct. 421 (1945); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Lilly v. Grand Trunk R. Co.*, 317 U. S. 481, 63 S. Ct. 347 (1943); *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (1943); and *Blair v. B. & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945). But in all of those cases, the question of causal connection between the negligence and the ensuing injury were properly left to the jury. Even under common law principles in strict Pennsylvania, on proof that a business invitee to premises falls on a stairway over which burnt-out light bulbs have negligently been permitted to remain, no such narrow

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It is interesting to note that in the Third Circuit, from which the instant case emanates, in a simple tort matter, where the liberal interpretation mandatory in F. E. L. A. cases is lacking, Judge Goodrich, speaking on causation, had this to say, in *Diesbourg v. Hazel-Atlas Glass Co.*, 176 F. 2d 410 (1949), at 413:

> "This question of proximate cause is as difficult a one for triers of fact as it is for law students. Events which cause people harm in the day to day world are not observed under the controlled conditions of a carefully organized testing laboratory. The best we can ever hope to get is approximate accuracy. That is true of the conduct of ordinary affairs of life by all of us and it should be good enough for a law suit."

That test, applied to the instant case, would have rendered impossible the decision of the Court of Appeals as grounded. The decision of a case should not depend on which three of the seven judges in a Circuit happen to be sitting. Else the result can be unequal justice.

The facts of the Moore case, referred to previously, were weaker than the facts in the instant case. Similar legal questions are, however, involved. It must be pointed out that the *Moore* case notwithstanding, *Healy* does present a question of fact exclusively for the jury.

All of these cases illustrate the problems of evidence engendered by restrictive interpretation of Rules 33 and 34 in *Alltmont, et al. v. U. S., et al.*, 177 F. 2d 971 (C. A. 3, 1949), cert. den. 339 U. S. 967, 70 S. Ct. 999 (1950). Under the necessity of showing undefined "good cause" as required in that case, vital evidence may successfully be suppressed. The effects of the *Alltmont* decision should be compared

with the cases arising under Federal Rules of Civil Procedure 26, 30, 31, 33 and 34 in the District Court for the Eastern District of Pennsylvania. In *De Bruce v. Pennsylvania R. Co.*, D. C. E. D. Pa., Civil Action No. 5477 (1947), 6 F. R. D. 403 (1947), and *Hickman v. Taylor*, 329 U. S. 495, 67 S. Ct. 385 (1947), the rules served truly as an emetic. All of the facts were made available and therefore a decision consonant with law and justice followed.[11]

The safeguard for all litigants faced with the restrictions of the discovery rules and the unavailability of proof in the exclusive custody of the defendant, lies in the broad adaptability of the jury system. In the case at bar, plaintiff proved a violation of safety rule 14 (p). The jury found, as a fact, that the failure to sound the whistle contributed in whole or in part to the death of Healy. To take this immemorial fact-finding function from the jury and to establish unattainable standards of proof before an issue may be submitted to the jury, as the Court of Appeals has done, represents a radical and retrograde departure from the established interpretation of the Federal Employers' Liability Act.

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[11] The importance of the rules of evidence may not be minimized. It should be noted that the Committee on Procedural Rules is not composed of members who are obliged to deal with the difficult problems of obtaining evidence. The Committee has no member who is a plaintiff's counsel. Therefore the importance of discovery, particularly in death actions, may not be realized. It is not reflected in the rules.

Under the discovery rules recently adopted in New Jersey, under the heading "Use of Depositions", 3:26-4, we find:

> "At the trial * * * any part or all of a deposition * * * may be used in accordance with any one of the following provisions:
>
> "* * * The deposition of a witness whether or not a party may be used by any party **for any purpose** against any other party who was present or represented on the taking of the deposition, or who had due notice thereof, provided the court finds * * *"
>
> "* * * Upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of the witness orally in open court, to allow the deposition to be used." (Emphasis ours.)

CONCLUSION.

It must be assumed that Congress is aware of this Court's opinions in *Wilkerson v. McCarthy*, supra, *Tiller v. Atlantic Coast Line R. Co.*, supra, *Lavender v. Kurn*, supra, etc., and that its refusal to enact other legislation dealing with railroad employees indicates that these opinions correctly interpret the legislative intent. To permit the decision in the case at bar to stand without review would upset the well-established law and invite continuous re-litigation. Therefore, we respectfully urge that this is precisely the type of case which, in the interests of economy of time and administration of justice, is entitled to review under Rule 38.

Respectfully submitted,

JOHN H. HOFFMAN,
DONALD J. FARAGE,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

B. NATHANIEL RICHTER, of counsel for Petitioner, certifies that the Petition for Rehearing in the within matter is presented by him on behalf of Petitioner in good faith and not for any purpose of delay. Deponent also certifies that the Petitioner is restricted to the grounds specified in Supreme Court Rule 33, and as set forth in the Petition for Rehearing.

/s/ B. NATHANIEL RICHTER.